

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF MONTANA**

In re

**BRENDON KEITH RETZ,**  
  
Debtor.

Case No. **04-60302-7**

**DONALD G. ABBEY,**  
  
Plaintiff.

-VS-

**BRENDON KEITH RETZ,**  
  
Defendant.

Adv No. **05-00018**

**MEMORANDUM OF DECISION**

At Butte in said District this 21<sup>st</sup> day of June, 2005.

On March 8, 2005, Plaintiff initiated this adversary proceeding against Defendant. On April 8, 2005, Defendant moved to dismiss counts two, five, six, seven and eight of the complaint, but used the incorrect docket code for the motion. On April 11, 2005, Defendant refiled the same motion to dismiss counts two, five, six, seven and eight pursuant to F.R.B.P.

7012(b), which incorporates Fed. R. Civ. P. 12(b)(6), and used the correct docket code for such motion. On April 21, 2005, Plaintiff filed a response and requested a hearing on Defendant's motion. The hearing was scheduled for June 2, 2005, in Missoula. On May 26, 2005, Defendant filed a brief in support of his motion to dismiss. On June 1, 2005, Plaintiff filed an amended complaint, in an effort to address the issues raised in Defendant's motion to dismiss, and filed a supplemental response to Defendant's motion to dismiss. The Court held a hearing on June 2, 2005, concerning the Defendant's motion to dismiss, and Plaintiff's response thereto. At the hearing, Attorneys Harold V. Dye, of Missoula, Montana, appeared for the Defendant, and Edward A. Murphy and Michael G. Black, of Missoula, Montana appeared for the Plaintiff Donald G. Abbey. No testimony or exhibits were admitted, and the Court took the matter under advisement at the conclusion of the hearing, subject to Defendant submitting a report to the Court as to whether the amended complaint filed on June 1, 2005, cured the relief requested by Defendant's motion, and thereby rendered Defendant's motion moot. Defendant has not filed an answer to the original complaint or to the amended complaint.

After reviewing the record and applicable law, and for the reasons set forth below Defendant's motion to dismiss counts two, five, six, seven and eight of the original complaint under F.R.B.P. 7012(b), which incorporates Fed. R. Civ. P. 12(b)(6), will be denied as the motion has been rendered moot by the amended complaint filed by Plaintiff.

This Court has jurisdiction of this adversary proceeding under 28 U.S.C. § 1334(b). Plaintiffs' claims seeking denial of Debtor's discharge and exception from discharge are core proceedings under 28 U.S.C. § 157(b)(2)(I) and (J).

### ***APPLICABLE LAW AND DISCUSSION***

The filing of the amended complaint and F.R.B.P. 7015, incorporating Fed. R. Civ. P. 15(a), governs this decision on Defendant's motion to dismiss for failure to state claims upon which relief can be granted under F.R.B.P. 7012(b), incorporating Fed. R. Civ. P. 12(b)(6).

Under Rule 15(a) of the Federal Rules of Civil Procedure, "[a] party may amend the party's pleading once as a matter of course at any time before a responsive pleading is served. . . ." Fed.R.Civ.P. 15(a). The defendants in this case never filed an answer. Instead, they filed a motion to dismiss. "A motion to dismiss is not a 'responsive pleading' within the meaning of the Rule. Neither the filing nor granting of such a motion before answer terminates the right to amend; an order of dismissal denying leave to amend at that stage is improper." *Doe v. United States*, 58 F.3d 494, 497 (9th Cir.1995) (internal quotation marks omitted). Accordingly, the district court erred in dismissing the action without giving Saaf the opportunity to amend his complaint. *See also Supermail Cargo, Inc. v. United States*, 68 F.3d 1204, 1207 (9th Cir.1995) ("[A] complaint cannot be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts that would establish the timeliness of the claim.").

*U.S. ex rel. Saaf v. Lehman Brothers*, 123 F.3d 1307, 1308 (9<sup>th</sup> Cir. 1997).

In this adversary proceeding, Plaintiff has amended his complaint and has averred additional facts. Defendant's 12(b)(6) motion to dismiss only relates to counts two, five, six, seven and eight in Plaintiff's original complaint and has been rendered moot by the amended complaint. Defendant may file his 12(b)(6) motion involving the amended complaint prior to filing an answer if Defendant believes that such motion has a basis in law. To proceed through the initial procedural challenges, the Court will direct that the Defendant file such motion on or before June 30, 2005, and that Plaintiff file any response and request for hearing on or before July 5, 2005, setting the matter for hearing on July 7, 2005, at 9:00 a.m., in Missoula, Montana.

IT IS ORDERED that a separate order will be entered denying Defendant's motion to dismiss counts two, five, six, seven and eight of Plaintiff's original complaint for their failure to

state a claim upon which relief can be granted under F.R.B.P. 7012(b), which incorporates Fed. R. Civ. P. 12(b)(6), as the motion has been rendered moot by Plaintiff's amended complaint.

BY THE COURT

A handwritten signature in dark ink, reading "Ralph B. Kirscher", is written over a horizontal line.

HON. RALPH B. KIRSCHER  
U.S. Bankruptcy Judge  
United States Bankruptcy Court  
District of Montana